Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 5, 1998

Mr. Edward W. Dunbar
Dunbar, Crowley & Hegeman
4726 Transmountain Drive
El Paso, Texas 79924

OR98-1842

Dear Mr. Dunbar:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 117097.

You advise that the El Paso Community College (the "college") has received a request for information it holds relating to a faculty member, who, according to a copy of a letter placing him on administrative leave attached to your request, is the subject of an investigation by the college for "sexual misconduct, financial mismanagement, program mismanagement, unprofessional conduct, continuing or repeated neglect of professional responsibilities, and failure to follow district policies and procedures." The letter indicates that the college's concerns include "claims of sexual advances and/or requests for sexual favors ..., authorizing and/or accepting payment for courses that did not make, issues related to excessive release time and/or overload pay for instructors, failing to ensure that tuition money and money from book sales were properly accounted for, and issues related to the hiring and firing of employees."

The request for information, submitted by the faculty member's attorney, asks for "any and all documents" relating to the reasons for the suspension and investigation, as well as personnel files, appraisals, "complaints or concerns" about the individual and his work, documents relating to the decision to suspend, reprimands and warnings, procedures for the college's investigation of allegations, procedures for challenging college determinations, and correspondence or other documents exchanged between the college and persons with regard to the allegations.

You indicate that the college will provide the requested personnel files, appraisals, and information setting out college procedures in disciplinary matters, but argue that the

college may or must withhold other information implicated in the request under various permissive or mandatory exceptions to disclosure.

A principal exception you claim is Government Code section 552.103(a), the "litigation exception," which excepts from required public disclosure information

> (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
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> (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

You say that the college has "concluded that charges will be brought against Dr. Burke and a due process disciplinary or discharge hearing conducted should this be wished by Dr. Burke." "Due process would include notice, exchange of exhibits and the making of a record."[1] You contend that "[t]he attorney general has held that an EEOC proceeding is litigation," citing Open Records Decision No. 336 (1982), and that "the procedural and substantive matters involved in a due process hearing are far more akin to litigation than is an EEOC claim."

We do not read Open Records Decision No. 336 to stand for the proposition that an EEOC proceeding "is" litigation for purposes of the section 552.103 exception. It states rather that "a pending complaint before the EEOC indicates a substantial likelihood of potential litigation," citing Open Records Decision No. 281 (1981). The latter decision had allowed the litigation exception during the pendency of an EEOC claim where the lawyer of the state agency from whom the related records were sought and the assistant attorney general representing the agency had both determined that there was a "reasonable likelihood" that the EEOC matter would lead to a lawsuit. *See* Open Records Decision No. 386 (1983).

Open Records Decision No. 588 (1991) found that information related to a disciplinary proceeding against an insurance agent conducted by the then State Board of Insurance "under APTRA" (the former Administrative Procedure and Texas Register Act, V.T.C.S. art. 6252-13a; *see now* Administrative Procedure Act, Government Code ch. 2001) was within the section 552.103 exception, adopting the rationale that in APTRA proceedings fact questions are determined by the agency and the agency's findings are appealable under the substantial evidence rule. The agency proceeding was thus an integral part of subsequently instituted lawsuits on the same issues. The opinion contrasted agency

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[1]The sentence beginning with "Due process" is quoted from your May 15, 1998, letter to us in this matter. Other quotes are from your May 22, 1998, letter.

proceedings not subject to APTRA and appealable by trial *de novo*, indicating that such proceedings would not be within the section 552.103 litigation exception. *See* Open Records Decision No. 588 (1991) and authorities cited there. We find no authority for extending the protection of the litigation exception to the kind of college disciplinary proceeding you describe here.

You indicate as well that the college has "concluded that litigation in the civil court system should be pursued to recover losses incurred by the college" and that it also intends to file a "dischargibility lawsuit" in bankruptcy proceedings that have been instituted by the faculty member in question. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. Open Records Decision No. 452 (1986) at 4 and authorities cited therein. Moreover, the litigation exception does not apply where there is no showing of a direct relationship between the information sought and the pending or contemplated litigation. Open Records Decision No. 222 (1979). Even assuming that the college reasonably anticipates instituting a civil proceeding to "recover losses" and also intervening in the bankruptcy proceeding, we find that you have failed to establish a "direct relationship" between any specific items of information you seek to withhold under section 552.103 and such contemplated litigation, and thus that you may not withhold any of the information at issue under the "anticipated litigation" exception.

You appear to claim that some of the information you submitted may be withheld as "attorney work product." The attorney work product exception has been treated both as an aspect of the section 552.103 litigation exception and also of the separate section 552.111 exception for "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." For attorney work product information related to current or pending litigation, either section 552.103 or section 552.111 may be claimed; when the litigation is concluded and thus outside the scope of section 552.103, only section 552.111 can apply. Open Records Decision No. 647 (1996). As indicated above, we do not find that you have established the applicability of the section 552.103 litigation exception here; therefore you may not avail yourself of the attorney work product aspect of the provision. Furthermore, under section 552.111 -- where it must be shown 1) that there is a "substantial chance that litigation would ensue" and, 2) that the governmental body "believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing such litigation" -- we do not believe that you have shown with sufficient specificity that any of the information at issue was prepared for "litigation" as distinct from *e.g.* the contemplated disciplinary proceeding which, as indicated above, we do not consider to be "litigation." *See National Tank v. Brotherton*, 851 S.W. 2d 193 (Tex 1993) and other authorities cited in Open Records Decision No. 647 (1996).

You also raise the "attorney client privilege," which this office has considered as an aspect of the section 552.107(1) exception for "information that ... an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas

Rules of Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct." *See* Open Records Decision No. 574 (1990). This office has construed the "attorney client privilege" for Open Records Act purposes as limited to "factual information or requests for legal advice communicated by the client to the attorney, as well as to legal advice or opinion rendered by the attorney to the client or to an associated attorney in furtherance of the rendition of legal services to the client. Notes made by an attorney in a case file are protected to the extent that they document client confidences or the attorney's legal advice or opinion communicated to the client; mere factual notations, or notations concerning information garnered from third parties, are not protected." *Id.* Thus, section 552.107(1) does not protect all the information found in a governmental attorney's files. *See,* Open Records Decision No. 574 (1990). Moreover, the governmental body bears the burden of explaining how particular information constitutes client confidences or communications of legal advice or opinion subject to the exception. Open Records Decision No. 589 (1991). We do not find that you have carried this burden with respect to the information at issue; consequently, you may not withhold any of it under section 552.107(1).

In addition, you invoke the "informer's privilege." This office has treated the informer's privilege as an aspect of section 552.101, which protects information "considered to be confidential law, either constitutional or statutory, or by judicial decision." *See* Open Records Decision No. 515 (1988). The privilege protects the identity of a person who 1) reports a violation or possible violation of law 2) to officials charged with enforcing the particular law. *Id.* In our opinion, the informers' statements in the information you submitted, even if they might be construed as "reporting violations or possible violations of law," do not meet the second prong of this test. That is, the laws in question -- *e.g.* ones proscribing theft -- are not ones the college personnel to whom the violations were reported are themselves charged with enforcing. Thus, we do not find that any of the submitted information may be withheld under the informer's privilege.

You also ask whether some of the information must be withheld under the privacy aspects of section 552.101, which, again, excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Material must be withheld under common-law privacy principles if it is both "highly intimate and embarrassing" and of no legitimate interest to the public. Open Records Decision No. 611 (1992). The court in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) held that identities of witnesses to incidents which became the subject of sexual harassment complaints or proceedings at the college, and of victims of such harassment, are protected by common-law privacy under section 552.101. Thus, such witness and victim identities, as well as material which tends to identify these individuals, must be redacted prior to release of the materials requested here.

You also express concern that some of the requested information is subject to the Family and Educational Privacy Act of 1974, 20 U.S.C. sec. 1232g ("FERPA"), which prohibits *inter alia* the disclosure without the student's consent of student records, other than "directory" information, by a post-secondary educational institution which receives federal

funds. *See also* Government Code section 552.026 (release of education records in conformity with FERPA). The information you submitted does appear to contain references to students at the college. You must delete these references from any materials before releasing them as well as information which tends to identify particular students. *See generally* Open Records Decision No. 634 (1995).[2]

Finally, we note that some of the requested materials appear to contain college employee home address, telephone number, social security and/or family information. For those employees who have opted, prior to the date of the request, to deny public access to this information under section 552.024, section 552.117 requires that this information be redacted before releasing the materials. *See* Open Records Decision No. 530 (1989).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

William Walker
Assistant Attorney General
Open Records Division

WMW/KHH/ch

Ref.: ID# 117097

Enclosures: Submitted documents

cc: Mr. Henry C. Hosford
Baskind, Samaniego & Hosford
300 E. Main, Suite 908
El Paso, Texas 79901
(w/o enclosures)

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[2]You may note that Open Records Decision No. 634 (1995) determined that educational institutions may withhold student record information protected by FERPA without seeking a determination from the attorney general.